
European and International Law**The Normative Interaction between International
and National in the Consular Law**

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Abstract: In this paper we have analyzed issues related to the feature of the consular law, i.e. to provide balance and to harmonize the two national legal systems, the one of the sending State and the receiving State, on the one hand, and the coexistence of the international norms and rules of internal law on regulating the consular relations, exercising the consular functions, organization and functioning of consular offices. For the development of paper we have used as research methods the analysis of the problems generated by the mentioned subject, with reference to doctrinal views expressed in treaties and specialized papers, documentary research, interpretation of the legal norms in the matter.

Keywords: international law; international cooperation; sovereignty

1. Introductory Considerations

The interaction issue of international law with the internal law of the states concerned the legal thinking and generated disputes and contradictions over time, which have resulted in the development of “two opposing constructions” (Geamănu 1975, p. 108 and the next; Rousseau, 1965, pp. 4-11): dualism and monism (Diaconu, 2002, pp. 38-44).

The monistic theory understands the international law as a law of the same nature with internal law (Blacher, 2008, p. 5) and it considers that the international and

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national law form a single legal system, built on the principle subordination, resulting ranking the legal rules in two variants: monism with primacy of international law and the monism with the primacy of internal law. (Geamănu, 1975, p. 109)

Examining the dualistic theory, which is based on the differences between national and international law, it appears, on the contrary, the existence of two distinct legal orders independent, separate. As a consequence, the application of international law in the legal order of states can only be achieved after the conversion of the international rules of law into norms of internal law. (Anghel, 1999, pp. 17-18)

In the Romanian doctrine (Bolintineanu & Nastase, 2000, pp. 16-19) it has been criticized the total dominance of each of the two theories, considering that it cannot be confirmed by practice (Miga-Besteliu 2005, p. 12). Ion M. Anghel urges the waiver of such “*rigid formulations*” (Anghel, 1999, p. 23), the complexity of the relationship between national and international law requires an approach that aims at considering the interference between the two legal systems, in this stage of the evolution of international relations and taking into account the concrete realities that require the cooperation of all states for solving global problems.

As for the Consular Relations, the scope of interference of the two legal systems (national and international) is larger than in other branches of international law and it builds as a feature of consular law.

2. Consular Law and the International Legal Order

The consular law is, undoubtedly, a part of public international law. This feature of the consular law was included in most definitions of this branch of law in the specialized literature. Dumitru Mazilu, for example, states that the consular law “*can be defined as being the branch of international law which contains all the legal rules which regulates the consular relations, organization and functioning of consular offices, their legal status and consular staff.*” (Mazilu, 2006, p. 290) Ion M. Anghel consular law refers to as “*conceived as part of international law (...), which has the character of an instrumental mechanism that works towards a certain purpose of international law, namely: cooperation between countries in a given area of the international life - that of protecting its own citizens.*” (Anghel, 2011, p. 519)

The consular relations, the regulatory object of consular law, is that part of

international relations, the interstate relations established by the agreement of two states on the exercise of consular functions by the bodies of one in the other country. Carrying out the consular relations among States in accordance with the fundamental principles of international law requires “*mutual will for cooperation*” and “*mutual trust*” (Maresca, 1971, p. 113).

We believe, therefore, that consular institutions as a whole legal framework governing a separate sector of the relations between states, appears as a right of cooperation (Constantin, 2004, p. 394), is essentially an institution that reflects cooperation among the states in protecting own citizens.

Consular relations are relations that are established in the international environment between entities acting within the international community. They exceed therefore, the limits within a single state.

Establishing the consular relations between sovereign states is achieved through a mutual agreement, expressed unequivocally (Burian, 2001, pp. 110-112). Vienna Convention, on Consular Relations of 1963, provides in art. 2, par. 1 that “*the establishment of consular relations between States takes place by mutual consent*”. The consular relations are actually relations established among states that have agreed to work together in the consular field as subjects of international law, under the principle of sovereign equality. The consular relations represent bilateral relationship that will result from the consistent agreement of will of the two states. Exercising consular functions aims at the protection of economic, commercial, cultural or scientific interests of the sending State and of the citizens of a state when they are in the State of residence. Conducting the consular relations is achieved by specialized institutions (consular offices or services within diplomatic missions) whose establishment is also conditioned by the existence of the consent of the receiving State, art. 4, point 1 of the 1963 Vienna Convention expressly stipulating that “*a consular post may be established in the territory of the receiving State only with that State’s consent*”. Also, the consular district shall be determined by mutual agreement between the sending State and the receiving State. The content of art. 4, point 2 of the 1963 Vienna Convention states: “*the seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State*”. In accordance with section 3 of article 4 of the 1963 Vienna Convention “*subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State*”.

We observe unequivocally the conventional nature of the mentioned rules, which exclude the existence of a unilateral act of a state in the mentioned matters. Among these formulations, the 1963 Vienna Convention highlights the decisive role of the concerted consent of the two states involved in consular relations, in respecting the principle of sovereign equality of states.

3. Consular Law and Internal Legal Order of States

The consular activity involves numerous aspects in the internal legal order of states. Just by the fact that while international relations are established between subjects of international law, most consular functions are functions of internal law which are exercised abroad, the content of consular relations is special.

Exercising consular functions is intended, as finality, to the assistance and insurance of protection of rights and interests of legal or physical entity that have the citizenship / nationality of a country and they are abroad. These people are therefore under the concurrent jurisdiction of two states, as it creates a relation between the national jurisdictions of the two countries, which meet and interfere: the territorial jurisdiction of the receiving State and personal jurisdiction of the sending State. State of residence, under the exclusive nature of sovereignty, has the right to prescribe laws and implement them through its bodies, in its territory. The sending State under political and legal bond of citizenship has the right to protect its own citizens even when they are on the territory of another State, still pursuant the exercise of its national sovereignty. In this respect, art. 17 of the Constitution states that *“the Romanian citizens abroad shall enjoy the protection of the Romanian state and must fulfill its obligations, except those that are incompatible with their absence from the country.”* This creates thus competition of jurisdictions, that need to be harmonized, so that the legitimate interests of the two states (of exercising territorial jurisdiction and protection of citizens) are not affected and in applying the principle of international cooperation.

There are regulated by internal law issues such as: citizenship, appointment and admission of consuls, setting limits and how to exercise consular functions, elements related to the legal status of the consular post, members of the consular office etc.

Legitimation insurance and defending the rights and interests of its citizens by a state (Mazilu, 2015, p. 64) is given by the bond of citizenship, which means a

person belonging to a certain state, the ratio of citizenship representing the legal basis of consular protection (Nastase, Aurescu & Jura, 2002, p. 199). It includes also the person's right to guardianship and defense regardless of his whereabouts. The citizenship can be defined as being "the permanent and effective political and legal link between an individual and a particular state, which generates rights and obligations for the citizen and the State" (Niciu, 2001, p. 74). The legal institution of citizenship belongs to the constitutional law, since the rules that built it are enacted by the state, under its sovereignty (Deleanu, 1976, p. 30). The rules regarding the ways of obtaining and losing nationality, the legal content of citizenship, its effects are established by the laws of each state, the regulation of citizenship is a prerogative of the states.

Even if the appointment and admission of head of consular is considered, as a whole, an international treaty (Anghel, 2011, p. 568) the report of consular mission involves two steps which are achieved within the legal systems of the two countries involved: appointment of the Head of consular post by the sending State and its admission by the State of residence. Article 10, point 1 of the Vienna Convention of 1963 states that "*Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State*". It falls within the jurisdiction of each state to determine the manner of appointment and admission of the head of a consular post in accordance with laws, regulations and usages of the sending State and, respectively, the state of residence.

According to article 6, point 2 of the Consular Regulation of Romanian, after obtaining the agreement of the Residence State, the Minister for Foreign Affairs signs the consular patent certifying the appointment of head of the consular career, his rank, the consular premises and consular jurisdiction, bearing the State's seal. Vienna Convention on Consular states the need to obtain the patent art. 11 item 1: "*The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post*". In accordance with art. 5, section 2 of the Regulation the Romanian consular, general consuls, heads of consular posts are appointed to the post by Government Decision at the proposal of the Ministry of Foreign Affairs¹. The appointment of other career consular officials, other than the head of consular offices and consular employees

¹ See, for example, Case no. 281/2015 appointing the Consulate General of Romania in Dubai, published in the Official Monitor, no. 298 of April 30, 2015.

and service staff is made by the order of the Minister of Foreign Affairs.

Article 11 of the Romanian Diplomatic and Consular Body Status¹ states that consular degrees are granted by the Minister of Foreign Affairs, the Commission proposal for granting diplomatic and the consular ranks.

The admission of the head of consular office for the performance of what it has been entrusted by the State of residence by the exequatur. This rule is established in the Vienna Convention of 1963 in art. 12, item 1: *“The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization”*. The Convention is not specific on the competent body that shall grant the exequatur, which will be determined by the law of the State of residence. In the doctrine it mentions that in the practice of some countries in this matter the exequatur is granted by the Head of State, if the patent was issued by the head of the sending State, but also that in other states the foreign minister is the one signing always the release of the exequatur (Anghel, 2011 p. 575).

The Romanian Consular Regulation² establishes in art. 2, point 2 that *“The establishment, abolition and change in rank of consular career posts are made by the decree of the President of Romania, proposed by the Government. The decree shall be published in the Official monitor”* thus by acts related to domestic law. The establishment of consular offices is, however, only with the consent of the receiving State, the need for such consent being one of the fundamental rules of the consular law.

Law no. 37/1991 on the establishment, abolition and change in rank of diplomatic missions and consular offices³ establishes in a single article that they may take place only by the decree of the President, at the proposal of the Government. By the decree no. 720/2015 on the establishment of the General Consulate of Romania in Bari, Italy⁴, for example, the Romania's President decreed that this consulate is established, with a number of 7 positions: a general consul, a consul, a vice-consul, two consular officials, one secretary - typist - accountant and one quartermaster - driver.

¹ Law no 269 of 17 June 2003 on the Romanian Diplomatic and Consular Body Status, published in the Official Monitor of Romania, Part I, no 441 / June 23, 2003.

² Approved by Government Decision no. 760 of 16 September 1999 (Official Monitor no. 468 of 27 September 1999).

³ Published in the Official Monitor no. 117 of May 30, 1991.

⁴ Published in the Official Monitor of Romania no. 685 of September 9, 2015.

By the provisions of the 1963 Vienna Convention it establishes that the sending State is the one that secures the seat of the consular post, rank and his constituency, but the state of residence is the one who decides regarding their approval. In Romania, according to art. 2, point 4 of the Romanian consular Regulation the headquarters of the consular offices and consular jurisdiction are set by the Ministry of Foreign Affairs.

Regarding the consular posts, as a whole of the attributions that the consulates and consular staff have, they strongly illustrate the interference of the two legal systems. The state of residence is the only one entitled to make, through its bodies, acts of jurisdiction on its territory but, by derogation from the jurisdiction of the territory jurisdiction principle, with exceptional feature, it is allowed in cases precisely determined as consular offices, through their staff, to conduct activities and meet certain acts that concern the citizens on the territory of the sending State of residence.

The 1963 Vienna Convention sets out these functions in art. 5, but the list is not exhaustive if we consider the final mark of this article (point m) *“performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State”*. The Consular functions are determined by bilateral agreements, which refer to laws and regulations of the receiving State concerning the admissibility of their exercise conditions or they are specified by regulations of the sending State if the receiving State does not object. A legal instrument recently issued by the Romanian Foreign Minister is meant to ensure efficient consular activity and facilitate the access of Romanian citizens and other beneficiaries abroad to specialist services offered by consular network of Romania¹, establish uniform, clear, precise and useful procedures for the consular activity and technological standards appropriate for 21st century.

¹ Minister of Internal Affairs Order no. 400/2016 concerning the technical arrangements to provide consular services and control of proceeds from these services to diplomatic missions and consular offices abroad, published in the Official Monitor of Romania no. 194 of March 16, 2016.

4. Conclusion

The conduct of consular relations, as complex part of international relations between states, in the context of contemporary international law favored the development of friendly relations between nations, setting forth specific aspects of interstate cooperation in an area where, although the international rules in the matter establishes the exclusivity of the national jurisdiction (exercise of sovereignty), the objective need to protect the interests of their own citizens has designed cooperation mechanisms to harmonize them and identifying the diplomatic law in relation to other branches of international law.

5. References

- Anghel, I. M. (2011). *Dreptul diplomatic și dreptul consular/Diplomatic and consular law*. Bucharest: Universul Juridic.
- Anghel, I. M. (1999). *Tratatul internațional și dreptul intern/ The international treaty and internal law*. Bucharest: Ed. Lumina lex.
- Blachèr, P. (2008). *Droit de relations internationales/ Law of International Relations*, 3rd edition. Paris: LexisNexis.
- Bolintineanu, A., & Năstase, A. (2000). *Drept internațional comparat/International and comparative law*. Bucharest: All Beck.
- Burian, A. (2001). *Drept diplomatic și consular/ Diplomatic and consular law*. Chisinau: Editura ARC.
- Constantin, V. (2004). *Drept internațional public/ Public international law*. Timișoara: Editura Universității de Vest.
- Deleanu, I. (1976). *Cetățenia română/Romanian Citizenship*. Cluj-Napoca: Editura Dacia.
- Diaconu, I. (2002). *Tratat de drept internațional public/Treaty of public international law vol. I*. Bucharest: Lumina lex.
- Geamănu, G. (1975). *Dreptul internațional contemporan, vol. I, Ediția a II-a revizuită și adăugită/ Contemporary international law, vol. I, Second edition revised and added*. Bucharest: Editura Didactică și Pedagogică.
- Maresca, A. (1971). Les relations consulaires et les fonctions de consul en matière de droit privé/ Consular Relations and the functions of the consul in private law matters. In G.-G. & Nonnenmacher, *Recueil des cours/ Collected Courses*, 134 (1971) (pp. 105-162). Leiden, the Netherlands: Martinus Nijhoff.
- Mazilu, D. (2006). *Diplomația. Drept diplomatic și consular/ Diplomacy. Diplomatic and Consular Law, 2nd edition*. Bucharest: Lumina Lex.

Mazilu, D. (2015). Rolul cetățeniei – condiție generală a protecției diplomatice/Citizenship's role – a general condition of diplomatic protection. *Revista Universul Juridic/ Legal Universe Journal*, no. 10 , 64-77.

Miga-Beșteliu, R. (2005). *Drept internațional public/ Public international law, Vol. I*. Bucharest: ALL Beck.

Năstase, A., Aurescu, B., & Jura, C. (2002). *Drept internațional public. Sinteze pentru examen, Ediția a III-a/ Public International law. Summaries for the exam, 3rd Edition*. Bucharest: ALL Beck.

Niciu, M. (2001). *Drept internațional public/ Public International law*. Arad: Editura Servo-Sat.

Rousseau, C. (1965). *Droit international public/ Public International law*, 3rd Edition. Paris.

internațional public. Sinteze pentru examen, Ediția a III-a. București: Ed. ALL Beck.

Niciu, M. (2001). *Drept internațional public*. Arad: Editura Servo-Sat.

Rousseau, C. (1965). *Droit international public, ed. a III-a*. Paris.